

February 14, 2002

The Honorable John Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW
Washington, D.C. 20530

Dear Mr. Attorney General:

Thank you for your recent letter responding to my concerns regarding the settlement of the *Microsoft* case.

At the outset, I must note that circumstances have changed dramatically since we last communicated that cast even further doubt on the Administration's actions in the Microsoft case. For example, I note your decision to recuse yourself from the *Enron* matter because your Senatorial campaign had received contributions from Enron. However, I am disappointed you have failed to take similar action in the *Microsoft* case, a matter involving a party from whom you also received sizable contributions, \$20,000 in the 2000 election cycle alone. As a result, I request you explain why the reasons that dictated your recusal in the *Enron* matter did not also necessitate such a recusal in the *Microsoft* case.

In response to the points raised in your November letter, I am disappointed that you dismiss detailed and substantive media reports of allegations of political impropriety by citing the approval of the settlement itself by a few editorial boards. It should be noted that these editorial boards have taken no position on these allegations of impropriety involving David Israelite and I am quite certain that, if these allegations are proven, these editorial boards may well reexamine their view of the settlement. As you know, credible allegations of political impropriety were reported in major newspapers such as *The New York Times* and *The Washington Post*. The settlement you proposed is, in fact, so suspect that no less than nine states and the District of Columbia have taken the unprecedented step of proceeding on their own. In addition, as the Department reported to Judge Kollar-Kotelly, public comments against the settlement have outnumbered positive comments by two to one.

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I am also puzzled by your claim that government officials have the right to maintain some inviolate code of confidentiality in their communications with private corporations. First, it is unclear from your letter whether you are asserting that executive privilege exists with respect to these communications. If so, it would be an unprecedented and improper assertion of that privilege.

It should also be noted that the Supreme Court has affirmed repeatedly that Congress has the right to investigate the Department's conduct of civil litigation matters. *McGrain v. Daugherty*, 273 U.S. 135, 151 (1927); *Sinclair v. United States*, 279 U.S. 263, 295 (1929) (Congress' authority "to require pertinent disclosures in aid of its own constitutional power is not abridged" because the information may be used in lawsuits.); *Watkins v. United States*, 354 U.S. 178, 187 (1957) *See also ATX, Inc. v Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (congressional inquiry and oversight of agency actions does not rise to level of influential political pressure that is necessary to require judicial condemnation).

Within that responsibility, Congress has the right and obligation to seek documents, testimony and information to review the Department's prosecutorial decisions for misfeasance, malfeasance or maladministration. 273 U.S. at 151 (noting Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice"); 354 U.S. at 187, 200 n. 33 (Court recognized "power of Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government.") Courts have also found that your claims that such disclosure will hamper or chill your communications in such future matters has no legal standing and is insufficient to overcome our Constitutional power to obtain such information. *See Gulf Oil Corp. v. FPC*, 563 F.2d 588, 610 (3d Cir. 1977) (absent a constitutional prerogative of the Executive, courts are likely to be sensitive to the importance of congressional committee oversight and investigations and should not lightly interfere in such investigations).

As a result, I would again reiterate my request that the Department respond in full to my requests for information set forth in my earlier letters (copies attached). At the same time, I will forward our communications to Mr. Alberto Gonzales at the White House for his response to questions involving White House contacts. Although I would also note that to the extent the contacts are between White House and Justice Department personnel, your Department should be able to respond in full.

Regarding David Israelite's communications with Microsoft, I hope you would concede that I cannot blindly accept his claim of recusal without further investigation. In response to my inquiries, however, your letter simply reiterates his assertion that he did not violate the terms of his recusal. I request that you provide a copy of Mr. Israelite's recusal so that its terms can be examined fully. Furthermore, your assertion that you are unable to provide further information on his communications because the settlement is not final is specious. My request for information on

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these matters, and your duty to provide such information, is not impacted by the stage of the settlement process. *Sinclair v. United States*, 279 U.S. 263, 295 (1929) (pendency of lawsuit does not divest congressional committees of the power to investigate the administration of the laws of the land). Further, pursuant to the Tunney Act, it would seem that maximum disclosure and sunlight is required to vindicate the public interest.

Finally, I would like to take this opportunity to comment on recent proposals by the Department and the Federal Trade Commission to reallocate antitrust review and enforcement authorities between themselves. I am a long time supporter of the Department, however with the continuing swirl of allegations regarding political favoritism in the Microsoft case ongoing, and the Department's continuing failure to address the questions I have raised, I cannot support such a vast overhaul of the Department's antitrust authority at this time.

Once again I must insist that the Department be open and honest with Congress and the American people and refrain from hiding behind vague claims of privilege and unfounded legal theories. Please provide direct answers to the questions raised in my letters of September 6 and November 6, 2001.

Sincerely,

John Conyers, Jr.
Ranking Member

cc: The Honorable F. James Sensenbrenner, Jr.
The Honorable Timothy Muris, Chairman, FTC
Mr. Alberto R. Gonzales
Mr. Daniel J. Bryant